Ohio Consumers' Counsel

Robert S. Tongren
Consumers' Counsel

DOCKET FILE COPY ORIGINAL

June 9, 1997

William F. Caton, Secretary
Office of the Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: ***In the Matter of the Application by Ameritech Michigan Pursuant to Section 271 of the Telecommunications Act of 1996 to provide In-Region, InterLATA Services in Michigan***

Dear Secretary:

Enclosed please find the original and eleven (11) copies of the Comments of the Ohio Consumers' Counsel, plus diskette to be filed in the above referenced proceeding.

Please date-stamp and return the additional copy in the pre-addressed, postage prepaid envelope to acknowledge receipt.

Thank you for your attention to this matter.

Sincerely,

David C. Bergmann
Assistant Consumers' Counsel

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Enclosure

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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of the Application by	)	
Ameritech Michigan Pursuant to	)	
Section 271 of the	)	CC Docket No. 97-137
Telecommunications Act of 1996 to	)	
provide In-Region, InterLATA	)	
Services in Michigan	)	

COMMENTS OF THE OHIO CONSUMERS' COUNSEL

Robert S. Tongren, in his capacity as the Ohio Consumers' Counsel (OCC), submits these comments to the Federal Communications Commission (Commission) in response to Public Notice DA 97-1072, directing interested parties to comment on this application by June 10, 1997.[1] The OCC represents the interests of the residential telecommunications consumers of the state of Ohio pursuant to Ohio Revised Code Chapter 4911. The residential consumers of Ohio have an interest in whether the proper conditions for local competition have been established in their sister Ameritech state of Michigan. The standards set in this application by a regional Bell operating Company (RBOC) to provide in-region interLATA service pursuant to Sec. 271(d)(1) of the

[1] This comment period comes four months after that established for Ameritech Michigan's first application to the Commission under Sec. 271, in CC Docket 97-1. The OCC filed comments in that docket on February 6, 1997. Ultimately, Ameritech Michigan withdrew the earlier application.

Telecommunications Act of 1996 will certainly affect the eventual application of Ameritech Ohio.[2]

The OCC filed comments with the United States Department of Justice (DoJ) regarding the proper standards for the Department's consultative role in such applications. The OCC's DoJ comments cover some of the key issues facing this Commission in the instant docket. The OCC attaches and incorporates those comments herein. A few additional remarks are required in this particular context.[3]

From a residential consumer advocate's perspective, the linchpin of Sec. 271(c) of the Act is the Sec. 271(c)(1)(A) requirement that competitive service actually be provided to residential consumers before an RBOC can enter the interLATA in-region market.[4] Congress could have provided that business competition was enough, but did not do so.

In this case, Ameritech Michigan has the burden of proof to demonstrate to this Commission that it

> is providing access and interconnection to its network facilities for the network facilities of one or more unaffiliated competing providers of telephone exchange service ... to *residential* and business subscribers. For the purpose of this subparagraph, such telephone exchange service ... may

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[2] Prior to the instant Ameritech Michigan application, the Commission received a Sec. 271 application from SBC Communications Inc. concerning its operations in Oklahoma, being addressed in CC Docket No. 97-121(hereafter "SBC Sec. 271 Review").

[3] The OCC has been an active participant in the Public Utilities Commission of Ohio's investigation into Ameritech Ohio's compliance with Sec. 271. PUCO Case No. 96-702-TP-UNC, *In the Matter of the Investigation into Ameritech Ohio's Entry into In-Region InterLATA Services under Section 271 of the Telecommunications Act of 1996*. Hearings in the PUCO case are completed, and briefs have been filed. The PUCO has not issued an order.

[4] Ameritech Michigan's application is unambiguously brought under Sec. 271(c)(1)(A). "Brief in Support of Application by Ameritech Michigan for Provision of In-Region, InterLATA Services in Michigan" (May 21, 1997) ("Brief") at 9. Thus the question of whether Sec. 271(c)(1)(A) ("Track A") or Sec. 271(c)(1)(B) ("Track B") may be used by Ameritech Michigan does not arise here.

> be offered by such competing providers either exclusively over their own telephone exchange service facilities or predominantly over their own telephone exchange service facilities in combination with the resale of the telecommunications facilities of another carrier.

Sec. 271(c)(1)(A); emphasis added.

As to the requirement that competitors actually serve residential and business customers over "their own facilities" and the other requirements of Sec. 271, the OCC will, as will the Commission and others, review with interest the comments filed by those with direct experience in Michigan. Having read Ameritech's side of the story as set forth in the Brief to the Application and the accompanying affidavits, one would expect that other interested parties will contest Ameritech's account.[5]

On the key issue here, from the proof adduced in the Brief, it is clear that neither Ameritech Michigan's arrangement with MFS nor that with TCG helps Ameritech Michigan meet the statutory qualification of facilities-based service to residential customers. Ameritech Michigan admits that it "is unaware whether any of the Michigan customers of MFS or TCG subscribe to residential service...." Brief at 8. However, Ameritech Michigan claims that "by approved Michigan tariff, both MFS and TCG hold themselves out as being able to furnish such service." *Id.*[6] For MFS and TCG to be used

[5]See, e.g., Brief at 27: "Ameritech's interfaces are operationally ready."

[6] It is interesting to note that in its previous application, Ameritech Michigan *did not* claim that TCG offers service to residential customers. Brief in Support of Application by Ameritech Michigan for Provision of In-Region, InterLATA Services in Michigan" (January 2, 1997) ("97-1 Brief") at 18-19.

for the residential side of Sec. 271(c)(1)(A), Ameritech Michigan must demonstrate that residential customers are in fact taking service from a competitor.[7]

The only competitor that Ameritech Michigan claims is actually serving residential customers is Brooks Fiber: "According to Brooks Fiber, approximately 29% of its lines in service in Michigan provide service to residential customers and 71% provide service to business customers." Brief at 10, n.7 (citation omitted). Ameritech Michigan also notes that Brooks Fiber provides service over approximately 9,000 loops that Brooks has constructed and installed itself, and has a proprietary (undisclosed) number of loops ordered and in service from Ameritech Michigan.

Ameritech Michigan has failed to show that this service is provided "predominantly over [Brooks Fiber's] facilities," as the Act requires. Ameritech Michigan claims that Brooks Fiber serves residential customers, and Ameritech Michigan claims that Brooks Fiber has some facilities. Brief at 16. But the OCC is unable to uncover anything in Ameritech Michigan's Brief or affidavits that actually shows that Brooks' residential service is "predominantly" over Brooks' facilities.

Ameritech repeats here its theory that the "own facilities" of competitors required by the Act include unbundled network elements purchased from the ILEC. Brief at 13-15. Yet Ameritech fails to recognize that its position would allow competition from a NEC

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[7] Business customers have also been "first in line" for local service competition in Ohio. The record in PUCO Case No. 96-702-TP-UNC showed that Ameritech Ohio's only facilities-based operational competitor, MCI Telecommunications, serves only business customers. Indeed, Ameritech Ohio does not claim that any residential customers are served by any competing provider. The PUCO recently approved tariffs that would allow Time Warner Communications of Ohio to begin service to business customers over Time Warner's facilities. PUCO Case No. 85-1845-TP-ACE, Second Supplemental Finding and Order (May 22, 1997).

providing service *exclusively* over unbundled network elements to qualify an RBOC under Sec. 271(c)(1)(A). It is difficult to see how an exclusively unbundled network element-based competitor advances the state of competition any more than a resale competitor. The Act explicitly rejects the latter as a Sec. 271 qualifier for the RBOC, as Ameritech admits (Brief at 15). Surely Congress intended something more than what is proposed by Ameritech to represent facilities-based competition.[8]

The key point for the Sec. 271(c)(1)(A) analysis, however, is how many residential consumers are served by Brooks Fiber over Brooks Fiber's facilities. Ameritech correctly notes the disclaimer of some members of Congress that the Act was not intended to impose a specific "metric" on the level of competition. Brief at 70, n.77. Yet read literally, Sec. 271(c)(1)(A) would be satisfied if a facilities-based competitor served one residential and one business customer (or at most two residential and two business customers). Clearly, Congress intended that there be real -- not token -- competition. Whether there is real competition for residential consumers in Michigan is unclear. If it is assumed that the residential/business ratio is the same over Brooks Fiber's own loops as it is for Brooks

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[8] Ameritech Michigan cites this Commission's determination in the May 8, 1997 Report and Order *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, FCC 97-157, ("*Universal Service Report and Order*") at ¶ 155, that for the purposes of determining eligibility for universal service support under Sec. 214(e)(1)(A) of the Act, service provided entirely over leased unbundled network elements qualifies as over "own facilities." Brief at 15. Ameritech also notes the Commission's recognition in ¶ 168 of the *Universal Service Report and Order* that the Sec. 214(e)(1)(A) language is "very similar" to the Sec. 271(c)(1)(A) language. Brief at 15, n.11. Despite the similarities in language, the differences in the *purposes* of the two sections -- the first, a remedial one to broaden the reach of providers providing "universal services," and the second, a threshold to ensure that the local market is adequately open to competition before the RBOCs are allowed into the interLATA market -- clearly support applying different standards to the two sections.

Fiber as a whole, then Brooks Fiber has some 2600 residential customers served by those loops.[9] This represents *less than one-tenth of 1%* of Ameritech Michigan's 3.6 million residential customer base. A few residential customers in a single geographic area are not enough to meet the public interest standard of the Act.[10]

The importance of a strict standard for Ameritech's entry into the in-region interLATA market is shown by Ameritech's own information. Ameritech describes the current interLATA market as a "tight oligopoly" where the market share of the four largest firms exceeds 50% and the share of the largest firm exceeds 20%. Brief at 72. Notably, despite claims of benefits from its entry into in-region interLATA service (*see* Crandall/Waverman Affidavit, MacAvoy Affidavit), Ameritech does not show that an interLATA in-region market where the dominant local carrier is a player would be other than a slightly less tight oligopoly. On the other hand, until recently, the local service market in Ameritech Michigan's territory has been a virtual total monopoly, and now remains, at best, a near-monopoly.

As to the rest of the many issues invoked by this application under Sec. 271(d), the OCC simply requests that this Commission hold Ameritech Michigan to a stringent standard so that the goal of opening up the local market to competition will be well advanced before entry into the interLATA in-region market is allowed. Ameritech

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[9] 29% residential times 9,000 loops. In the context of Ameritech Michigan's 97-1 application, *State Telephone Regulation Report* (January 9, 1997), at 6, reported that "Ameritech noted that Brooks is providing service to 8,533 business lines and 3,621 residential lines using its own facilities in seven Grand Rapids exchanges." It was interesting that, according to Ameritech, Brooks could serve 12,154 customers over the 6,000 lines Ameritech said Brooks had built at that time.

[10] *See* SBC 271 Review, Evaluation of the United States Department of Justice (May 16, 1997) at 36-40.

Michigan fails to discuss the primary reason for the competitive checklist: Once interLATA entry is allowed, Ameritech will no longer have any incentive to cooperate in opening up the local market.[11]

Respectfully submitted,

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[11] AT&T was reduced to a market share of less than 60% before it was deemed nondominant. Clearly, Ameritech Michigan will dominate the local exchange market for some time to come.

Attachment to Ohio Consumer's Council
Comments on Ameritech Michigan
Section 271 Application

December 13, 1996

Mr. Don Russell
Chief, Telecommunications Task Force
Antitrust Division
U.S. Department of Justice
Room 8104 Judiciary Center Bldg.
555 4th Street, NW
Washington, DC 20001

Dear Mr. Russell:

Re: Letter from Joel Klein dated November 21, 1996

On behalf of Robert S. Tongren, in his capacity as the Ohio Consumers' Counsel representing the state's residential utility consumers, I thank you for the opportunity to respond to the questions posed in Joel Klein's letter concerning the entry of Bell companies into the interLATA in-region market pursuant to Sec. 271 of the Telecommunications Act of 1996 (the Act). The questions --stressing the impact on competition of such entry-- highlight the importance of the Sec. 271 issues.[1]

Here in Ohio, we are dealing with these issues on a number of fronts. The Public Utilities Commission of Ohio (PUCO) has before it PUCO Case No. 96-702-TP-COI, *In the Matter of the Investigation into In-Region InterLATA Service under Sec. 271 of the Telecommunications Act of 1996*. In this proceeding, the PUCO is looking to fulfill its consultative role under Sec. 271(d)(2)(A) of the Act. The hearings in this case are only partially complete; by motion of Ameritech Ohio made on December 12, 1996, the hearing will not conclude until sometime in late January.

[1] In your letter, you equate RBOCs' provision of "in-region interLATA services" as entry into the "long distance" market. A significant part of the "long distance" market is the intraLATA market, in which -- in Ohio as elsewhere -- the RBOC (Ameritech Ohio) possesses a virtual monopoly on Dial 1+ calling.

Another phase of the PUCO's consultative role under the Act is being addressed in PUCO Case No. 96-922-TP-COI, *In the Matter of Ameritech Ohio's Economic Cost for Interconnection, Unbundled Network Elements, and Reciprocal Compensation for Transport and Termination of Local Telecommunications Traffic.* That proceeding will determine whether the prices for Ameritech Ohio's carrier-to-carrier offerings meet the pricing standards of Sec. 251 and hence actually comply with the Sec. 271(c)(2)(B) checklist. Hearing in that docket is scheduled to commence January 6, 1997.

Further, the impact of Bell operating company entry into the interLATA market is key to the pending requests of Ameritech Communications, Inc. (ACI) to be certified as an inter- and intraLATA long distance carrier in Ohio in PUCO Case No. 96-327-CT-ACE. ACI has also requested certification as a provider of local exchange service to compete with, among others, its regulated incumbent affiliate Ameritech Ohio. PUCO Case No. 96-658-TP-ACE. These two applications have been consolidated for hearing and decision; hearing on rebuttal testimony begins December 9, 1996. A briefing schedule has not yet been set.[2]

Your letter requested a "focus on the relevant facts and specific evidence" that underlie our views. To the extent that the PUCO proceedings relevant to these issues are not complete, neither is the record on these issues complete. We will be happy to send you copies of the OCC's briefs in these proceedings as they are filed.

The PUCO proceedings focus, by and large, on the specific application of the Sec. 271 criteria in the state of Ohio. This is, in fact, required by the Act, which directs a state-by-state analysis. Given that the question in Ohio is *Ameritech's* entry into the interLATA market, Ameritech's actions in the other states in its region are also important. While we concentrate on Ameritech here, it is entirely possible that the same concerns apply to other RBOC's compliance with Sec. 271.

The OCC's responses to the specific questions posed in your letter are as follows:

1. *What potential benefits, if any, do you foresee resulting from Bell Company entry into long-distance? Specifically, what do you see as (a) the present state of competition in the provision of long distance services and the likely development of further competition absent near term Bell entry; and (b) the likely competitive impact of near term Bell entry into the long distance market.*

While there is competition in the long distance market, and such competition has produced benefits for consumers, the OCC sees little evidence that this is an *effectively* competitive market under any analytical framework. The recent lock-step price increases

2 The issue of Ameritech's entry into the interLATA market also appears, in one form or another, in many other PUCO proceedings.

announced by the market leaders (AT&T, MCI, and Sprint) are graphic evidence of the lack of effective competition in this market. Ideally, the addition of another major player -- the RBOC -- into the market should enhance the level of competition in the market.

However, the long distance market cannot be viewed in isolation. Whatever the level of competition in the long distance market, it is far greater than the virtually nonexistent competition in the local exchange market, particularly for residential consumers. The opening up of the local exchange market -- 60% of which in Ohio is controlled by Ameritech Ohio -- will benefit consumers far more than the addition of one more competitor in the long distance market. Further, the risk of anti-competitive behavior in the long-distance market based upon Ameritech Ohio's likely market dominance is shown in the record of the PUCO cases discussed above.[3]

Under this framework, the OCC urges the Department to hold Ameritech Ohio and the other RBOCs to a high standard of proof that the conditions of Sec. 271 -- both Sec. 271(c)(1)(A) and 271(c)(2)(B) -- have been met before the Department recommends to the Federal Communications Commission (FCC) that Ameritech Ohio's entry into the long distance market in Ohio is appropriate.

2. *What integrative efficiencies -- to producers or consumers -- are likely to result from the Bell Companies' ability to offer both long distance and local service? To what extent can those efficiencies be achieved by other firms through implementation of the local competition provisions of the Telecommunications Act? In what ways, if any, would Bell Company long distance entry affect the ability of other firms to achieve such efficiencies?*

In both of the PUCO dockets currently in hearing, Ameritech has put forth the notion of customer preference for "one stop shopping" as the main reason for ACI's application to provide local service. Other firms currently operating in the long distance market can provide one stop shopping if and only if the local bottleneck is opened to effective competition. Clearly, Bell operating company entry into the long distance market *before* the local market is open to competition would give Ameritech a tremendous competitive advantage.

3. *How do you anticipate that the Bell Companies will provide their long distance services (e.g., using their existing network, building additional network facilities, reselling other carriers' services, acquiring existing long distance carriers)? To what extent is this expectation relevant to an assessment of the risks and potential benefits of entry?*

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[3] Specific citations to the record will be provided in the OCC's briefs, to be delivered to the Department upon filing.

Based on the record in the ACI certification case, it appears that in Ohio ACI will use its own facilities to provide long distance service. This will include the use of existing network where possible, and the building of new facilities where necessary. The use of existing facilities should minimize the risks of entry into the long distance market; however, the fact that the facilities exist may exacerbate the possible impacts on the related local service market explained in the response to question 1, by easing ACI's entry into the long distance market.

4. *What are the risks that the Bell Companies' market power in local markets could be used to hamper competition in the provision of any telecommunications service, including both local and long distance services? Will the Bell Companies' ability or incentive to hamper competition be affected by their entry into long distance? Will the entry of the Bell Companies into long distance affect the incentives of long distance companies to expand into local service?*

The first question has already been responded to, in the response to question 1. Clearly, the Bell Companies' incentive to hamper competition will not be reduced by their entry into long distance; their ability to do so will, however, be reduced by an effective opening up of their local monopoly to competition. Where the terms for local competition are proper, Bell Company entry into the long distance market should be an incentive for long distance companies to enter the local market.[4]

5. *To what extent will the costs and benefits of entry, as felt in any market, vary under an entry standard that supports early entry, versus a standard that is likely to delay entry? Will there be a first mover advantage associated with the ability to offer integrated services, and if so, how significant is that advantage?*

In a single isolated market, under traditional theory, the benefits of early entry are greater than late entry. Yet as mentioned above, we are not dealing with an isolated market here. The connections between the local service market, the interLATA long distance market, and (indeed) the intraLATA long-distance market are so important as to overwhelm the simplistic single-market premise. Clearly, the thrust of the Act is to set the stage for, to enhance, and then to protect competition in the local exchange market. Given the relative market power of participants in the local and long distance markets, if there is a first mover advantage it will be less in the local market than in long distance. Hence, as discussed above, delaying entry of the RBOCs into the long distance market is likely to be less of a problem than delaying competitive entry into the local market.

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[4] Of course, not only long distance companies will be able to enter the local market. Other firms providing local service exclusively will also be important to competition.

The threshold for ensuring that there will be no delay in local competition, much less that such competition will be impeded, is the meeting of the Sec. 271 competitive checklist.[5] The Act also requires that there be actual facilities-based competitors providing actual service to actual customers, both business and residential. Sec. 271(c)(1)(A). The record in the PUCO proceeding demonstrates conclusively that no facilities-based competitor is serving any residential customer in Ohio. The establishment of the proper conditions for effective local competition cannot, however, ensure the long run economic viability of such competition. That remains to be seen.

Thank you again for this opportunity to express the interests of residential telecommunications consumers in this process. As mentioned above, we will be forwarding to you copies of the OCC's briefs filed in the PUCO proceedings as those briefs are completed.

Yours truly,

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[5] Similar conditions are required to ensure that there will be competition for local service in non-RBOC territory.